SUPPORTING BRIEF.

The opinion of the Circuit Court, 151 Fed. (2nd) 899, appears in full in the record (R. 357). No formal opinion was rendered by the District Court.

Jurisdiction.

The jurisdiction of this Court is invoked as set forth in the foregoing Petition for Writ of Certiorari.

Statement of the Case.

This brief will not be lengthened by a general statement of the facts in the case, as the errors complained of do not relate to them. It appears that if relief is warranted, it must be from the following circumstances.

One of the defendants, King, had possession of the counterfeit bills involved herein, and attempted to trade them for gasoline stamps on June 10, 1944 (R. 18). Petitioner did not participate in this attempt to dispose of the counterfeits. Petitioner's first connection with them was on June 25, 1944 (R. 27) according to an accomplice, Carter, who testified for the Government. Other than attempting to get this accomplice out of jail when he was arrested for passing the bills, Petitioner was not connected with or implicated by anyone else until in January, 1945 (R. 140). At that time, Agent Goldman of the Secret Service overheard a conversation between Carter acting in co-operation with the Secret Service and Petitioner (R. 139) in which Petitioner said of King and one of the other defendants: "I am afraid of them and I ain't making any money in this deal"; and further that, "I don't want to

get in a jam as I have too much to lose." The record discloses that defendant Rizzo completed the sale of the counterfeits to the disguised Secret Service Agents (R. 179) when petitioner refused to act.

The Court's Bailiff Stielow talked to the jurors during their deliberations (R. 328), and was called as a witness (R. 327) by the Petitioner's attorney in his attempt to get a new trial by reason of that conversation. He was denied the privilege of obtaining all of the conversation between the jurors and Stielow (R. 328). The prosecution, however, introduced the affidavits of two jurors relating to that conversation (R. 330).

The Court sentenced Petitioner to a total of seven years (R. 336). King was given a suspended sentence; Rizzo and Cicerello, were given two and three years respectively (R. 338).

SUMMARY OF ARGUMENT.

(1) Excessive punishment was inflicted while the Court was incensed at trial counsel.

(2) Exhaustive examination should have been permitted of the bailiff who talked to the jurors during their deliberations.

(3) It was error to permit the introduction of affidavits of two jurors, as affidavits cannot be cross-examined.

(4) The sentence imposed, together with the withdrawing of the offer to reduce it, indicates that the petitioner is being punished for acts of his counsel.

ARGUMENT.

Excessive Punishment Was Inflicted While the Court Was Inflamed at Counsel.

The record indicates (R. 159) that Petitioner was "afraid of them," meaning the other defendants in the case, and that King, and not petitioner, was the ringleader or moving spirit in the affair (R. 18). Notwithstanding this fact, Petitioner, as stated heretofore was sentenced to imprisonment for seven years, whereas King was placed upon probation. This disparity in sentences can be explained only upon the theory that the District Court was punishing Petitioner because of acts or statements of his counsel. That the District Court was indignant at counsel to the point of confusion during Petitioner's motion for a new trial is manifest from the record. The Court accused counsel of trickery (R. 335, 336) and went so far as to state that in the future it would have no dealings with counsel unless a court reporter were present. At the time of imposition of sentence, the Court ordered Petitioner committed to the custody of the Attorney General for confinement in a federal correctional institution (R. 336), and subsequently when its attention was directed by the Clerk to the error, ordered the sentence amended, confining Petitioner in a federal penitentiary (R. 337). At that time the Court made the statement that the record should show that Petitioner and his counsel were present in court. It was necessary for counsel to call the Court's attention to the fact that the defendant (Petitioner), who had left the court room in the custody of the Marshall, was absent (R. 337).

That the Court was in a very irritated frame of mind at

the time Petitioner was sentenced is further evidenced by the fact that Mr. Swidler, counsel for another defendant, was present in court while these proceedings were in progress. When he arose to argue his motion for a new trial, the Court inquired as to whether Mr. Swidler, who had advanced the same ground for his motion as had counsel for Petitioner, cared to urge that ground. Mr. Swidler immediately informed the Court that he did not wish to argue that question (R. 337, 338).

It is respectfully submitted that if the Court had not imposed sentence upon Petitioner while it was in a frame of mind which was quite obviously anything but impartial, but was on the contrary actually antagonistic and embittered toward Petitioner's counsel, and had taken the time which it should have taken to consider judicially and in retrospect the action of Petitioner's counsel, the term of imprisonment meted out to Petitioner would have been more in line with that given the other defendants. Subsequently (R. 394, 395), the Court did in fact offer to reduce Petitioner's sentence from seven to five years. Upon being irritated again by counsel for Petitioner (and it is submitted without cause), it withdrew such offer and declined to make any reduction in the sentence as originally pronounced (R. 394). It is this unjust, undue and excessive punishment under the circumstances that constitutes an abuse of discretion to the point of being cruel and inhuman and far from evenhanded justice.

An Exhaustive Examination of the Bailiff Should Have Been Permitted.

While the jury was out and counsel for the various defendants were in the chambers of the District Court, the Bailiff in charge of the jury, called the judge into the hall and informed him that the jury wanted to know whether

they had to pass on all the counts (R. 334). The Court instructed the Bailiff to answer, "Yes," and stepped back to the chambers and informed counsel of what had happened (R. 334). The defendants were in the court room at the time this occurred (R. 336). Counsel had been in the judge's chambers at the invitation of the judge.

After the Bailiff had made inquiry of the Court, as above stated, the jury returned a verdict finding all of the defendants guilty on all of the counts which had been submitted to them (R. 324).

Within the time allowed by the rules of Court after verdict, the then counsel for Petitioner filed a motion for a new trial, and advanced as one of the grounds therefor the communication between the Bailiff and the jury outside the presence of the Court, counsel and Petitioner (R. 327, 349). With leave of Court, the Bailiff, Emil Stielow, was called as a witness and examined by counsel for Petitioner (R. 327, 333). He admitted that he had a conversation with the foreman and some other members of the jury (R. 328), but was permitted to testify only as to what he said to the jury and not what members of the jury said to him (R. 328). It is respectfully submitted that such limitation constitutes reversible error. What members of the jury said to him may have been of no moment. Neither a reviewing court nor a defendant, however, ought to be placed in a position of having to guess, in respect to such a matter, any more than a defendant may lawfully be "guessed" into a penitentiary. An exhaustive examination should have been permitted of Stielow.

It Was Error to Introduce the Affidavits of Jurors.

The government offered the affidavits of two of the jurors in an effort to establish the fact that the jury had already reached its verdict when the Bailiff went into the jury room

and that consequently the conversation with the Bailiff was not prejudicial to Petitioner. Offered (R. 330); Received (R. 332). It is not possible to cross-examine an affidavit, and their admission was prejudicial error. The jurors should have been brought into open court, placed under oath and made available for cross-examination. If, as actually happened, the affidavits were to be used, the curtailment of the examination of Stielow by limiting his testimony to what he said to the jury was clearly reversible error.

The Court made a statement as to its recollection of the facts and censured counsel for Petitioner for raising the question and urging as error the fact that the Bailiff had conversed with members of the jury during their deliberations (R. 333-336). Counsel for Petitioner then asked leave to make a statement in reply to the Court's accusations and the colloquy which resulted appears in the record at page 336. The angry frame of mind of the Court is apparent.

The case of *Little* v. *United States*, 73 Fed. (2nd) 861 at 866, 867, is authority for the statement that communication between the jury and a third party outside the presence of the Court, accused and counsel, is *presumptively* prejudicial to the defendant. To permit various persons under one pretext or another to be with the jury in its deliberations is to open the door to grave abuse. Without exception such procedure has been held to be prejudicial error. *Mattox* v. *U. S.*, 146 U. S. 140 at 149 and 150.

Whether Petitioner was prejudiced by what transpired in the case at bar cannot be clearly determined from the record for the reason that the inquiry of Petitioner's then counsel into the facts was curtailed and limited as hereinabove described. Under the *Little case, supra,* the presumption is that what occurred was error. There should be

no communication between the court and jury except in open court. Also see *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76 at 81, 82.

In *Wheaton* v. *U. S.*, 133 Fed. (2nd) 522 at 526, where the Bailiff in charge of the jury entered the jury room and in answer to questions of the jurors proceeded to inform them that they would have to vote on each count and determine if the defendant was guilty or not guilty on each count, first on count one and then on the other counts separately (Stielow stated that he told the jury that all counts had to be accounted for), the court held such communication by the Bailiff to be prejudicial and that affidavits of jurors did not constitute proof of facts cited therein. It is respectfully submitted that the two affidavits by the jurors offered by the government for the purpose of establishing that the communication of the Bailiff with the jury was not prejudicial error, were incompetent and should not have been considered by the trial court.

The Sentence Imposed, Together with the Withdrawing of the Offer to Reduce It, Indicates That the Petitioner Is Being Punished for the Acts of His Counsel.

Immediately following the argument of counsel in support of Petitioner's motion for a new trial and after the Court had made its statement severely censuring counsel, the Court sentenced Petitioner to serve seven years on each of the first three counts and two years on the last count; the sentences to run concurrently (R. 336). The punishment, thus imposed upon Petitioner, when compared with the probation given King who was at least equally guilty, was extremely unfair, and reflects the resentment of the Court toward counsel for Petitioner; such resentment being crystallized because counsel dared to move for a new trial on the ground that the Court's Bailiff had

communicated with the jury before reaching a verdict. Surely Petitioner should not be made to serve additional time because of the acts of his counsel.

Numerous remarks of the Court about the length of cross-examination of Government witnesses in the presence of the jury were prejudicial to Petitioner and an indication of the increasing irritation of the Court because of acts of Petitioner's counsel.

During the course of the trial the Court frequently commented in the presence of the jury about the duration and length of the cross-examination of the Government witnesses by counsel for Petitioner. He referred to counsel's examination as "long and drawn out" (R. 64). He accused counsel of "going over the same material three or four times" (R. 65). The Court also stated that he was going to limit the cross-examination of the witness Carter (R. 98), and accused counsel for one of the defendants of being theatrical when he asked Carter to repeat an answer which he did not hear (R. 99). The Court also stated in such language as to make it plain to the jury that he was anxious to speed up the trial and to finish with the witness Carter (R. 90, 100). During the course of the cross-examination of the witness Goldman, the Court stated, "We spend so much time fooling around here," and later again remarked that counsel was "spending entirely too much time" (R. 222).

Cross-examination of a witness is a "right" and not a mere "privilege", and although counsel may create exasperating delays and indulge in repetitious questioning of witnesses, the judge should exercise patience in endeavoring to speed up the trial.

Lindsay v. *U. S.*, 133 Fed. (2nd) 368, at 369.

The series of remarks made by the Court relative to the length of cross-examination of Government witnesses by

defendant's counsel operated not only as a curtailment of the right of cross-examination, but also tended to belittle the efforts of counsel and make them less effectual in the minds of the jury. While such statements on the part of the trial court constitute such prejudice with respect to Petitioner as to justify a reversal, they in addition indicate, as stated above, the beginning of a feeling of resentment and irritation with counsel for Petitioner, which culminated in the abuse of discretion evidenced by the excessive punishment given Petitioner. The disparity in the sentences imposed on the Petitioner and King, who was actually the prime mover in the offense charged, is ample evidence of the temper of the Court rather than any difference in the culpability of these two defendants.

The record (R. 395) reflects that after the affirmance of the conviction by the Circuit Court of Appeals and after a consultation between the Assistant United States Attorney and the trial judge, the latter offered to reduce Petitioner's sentence from seven to five years, but that Petitioner believed the sentence should be reduced to three instead of five years. It is apparent from this that the trial judge believed, after due consideration, that the sentence as originally imposed was too severe. However, the trial judge again became angered by the assertion of Petitioner's counsel that under the circumstances it would be necessary to petition this Court (R. 395), and wrote to counsel: "You may consider that such proposed reduction and any other reduction will not be granted by me."

Is this fair, evenhanded, even-tempered justice?

The wide latitude and discretion granted a District Court in the imposition of sentence does not contemplate the punishment of a defendant for the acts of his counsel. He should be given a fair and proper punishment commensurate with his guilt, with regard to which the acts of

counsel are in no wise connected. The discretion exercised by the trial court was certainly harmful to Petitioner, and the manner and circumstances under which it was exercised constitute an abuse of such discretion.

Conclusion.

It is urged for the reasons stated that the Writ of Certiorari should be granted.

Respectfully submitted,

JAMES C. LEATON,
Attorney for Petitioner.